In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 197

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CROMPTON-HIGHLAND MILLS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING

Comes now the National Labor Relations Board and petitions this Court for a rehearing in the above-entitled proceeding. In support of its petition, the Board respectfully shows the Court as follows:

The decision of this Court in this matter, after sustaining the Board's position that the employer's conduct constituted an unfair labor practice, directed modification of the order which the Board

deemed appropriate, including the elimination of a requirement that the employer post suitable notices. The Board desires rehearing limited to the single question of the propriety of requiring the employer to post notices as part of the remedial action appropriate to the correction of the unfair labor practice found. Having had no reason to anticipate that this aspect of its order was in question, the Board had not in its earlier briefs addressed itself to this matter. The point had not been raised by the employer, and under Section 10(e) of the Act, the Board assumed it could not be in issue. The Board does not, of course, object to adapting the required notice to the substantive decree approved by this Court. But because it is important in the adequate redress of unfair labor practices, the Board is reluctant to risk impairment of a significant feature of its remedial practice by the complete elimination of the notice provision without further consideration by this Court.

Section 10 (c) of the National Labor Relations Act provides that, whenever the Board finds that a person has engaged in any unfair labor practice, the Board "shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

The Act "committed to the Board, subject to limited judicial review," the task of defining "the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations." *Phelps-Dodge Corporation* v. *National Labor Relations Board*, 313 U. S. 177, 194. In performing this function, the "Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. The public right and duty extend not only to the prevention of unfair labor practices by the employer in the future, but to the prevention of his enjoyment of any advantage which he has gained by violation of the Act . . . as the means of defeating the statutory policy and purpose." *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 364.[1] And in reviewing the remedy which the Board fashions, "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps-Dodge Corporation* v. *National Labor Relations Board*, 313 U. S. 177, 194. Within this frame of reference, the relevant inquiry is whether, in requiring the employer to post suitable notices, the

[1] See also, *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82.

Board's remedy bears a rational relation to undoing the past effect of the unfair labor practice and to preventing its future recurrence.

From the first order recorded in the Board's reports to the most recent order entered, with a few early exceptions, a fixed feature of every such order is the requirement that the person found to have engaged in an unfair labor practice, whether employer or labor organization, publicize the terms of the order among the employees in order that they may have accurate information as to the nature of the obligation to which adherence is enjoined.[2] Customarily, this dissemination of information takes the form of posting notices in conspicuous places in the plant where the unfair labor practice occurred, including all places where notices to employees are customarily placed. Where warranted by the circumstances of the case, the mode of communication may be varied to include the mailing of separate notices to individual employees, the publication of notices in the local newspapers, and the posting of the notices in other of the employer's plants than that at which the unfair labor practice was committed if the

[2] National Labor Relations Board, Thirteenth Annual Report (Gov't. Print. Off., 1949), p. 63; Twelfth Annual Report, pp. 37, 40; Eleventh Annual Report, p. 49; Tenth Annual Report, p. 53; Ninth Annual Report, pp. 48, 49-50; Eighth Annual Report, pp. 38-39; Seventh Annual Report, p. 52; Sixth Annual Report, p. 72; Fifth Annual Report, p. 78; Fourth Annual Report, p. 109; Third Annual Report, p. 214; Second Annual Report, p. 156; First Annual Report, pp. 125-126, 127, 132, 134.

effect of its perpetration transcends the limits of the single plant. To assure means of knowledge, the notice may be ordered written in a foreign language with which non-English speaking employees are familiar. The contents of the notice are fitted to the situation under redress. Thus the substance of the notice and the mode of its dissemination are adapted to the circumstances of the individual case, but in every case it is indispensable that the essence of the order and assurance of respect for its terms be publicized among the employees in ungarbled form through channels by which employees customarily obtain information.

Stemming from the decree in *Texas & New Orleans Railroad Company* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548,[3] confirmed by the experience of the old National Labor Relations Board under the National Industrial Recovery Act,[4] plainly contemplated as usual remedial action by the Congress,[5] the "posting of appropriate bulletins"[6] has until the present case been uniformly approved by this Court as

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[3] See, *National Labor Relations Board* v. *Brown Paper Mill Company, Inc.*, 108 F. 2d 867, 871-872 (C. A. 5).

[4] The practice of requiring employers to post notices had previously been frequently employed by the first National Labor Relations Board, set up under Public Resolution No. 44 (73d. Cong.) to investigate charges of violation of Section 7 (a) of the National Industrial Recovery Act. (See *e.g.*, *Matter of Globe Gabbe Corp.*, 2 N. L. R. B. (old) 60, 62.

[5] H. Rep. No. 1147, 74th Cong., 1st Sess., 23-24.

[6] *Ibid.*

within the allowable area of Board discretion in shaping an appropriate remedy.[7] Until the present case, the statement of Judge Learned Hand nine years ago remained true:[8] "The employer must indeed post a notice that he will conform to the Board's order; that is no longer open to dispute, and, so far as we know, no court has ever held the contrary." Thus, in the single instance where the propriety of posting any notice was squarely in question, the Court of Appeals for the Fourth Circuit, after holding that no notice need be posted because there was "no ground to apprehend a continuation of illegal practices, and no necessity to subject the employer to the stigma attached to the publication" (94 F. 2d 61, 67), upon rehearing reversed its position, stating that (*Mooresville Cotton Mills* v. *National Labor Relations Board*, 97 F. 2d 959, 963):

> . . . it is doubtless the better practice to require the posting of notices *in all cases* so

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[7] *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 268; *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 348; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 462-463; *National Labor Relations Board* v. *Bradford Dyeing Ass'n.*, 310 U. S. 318, 343; n. 9; *National Licorice Company* v. *National Labor Relations Board*, 309 U. S. 350, 356, 367; *National Labor Relations Board* v. *Express Publishing Company*, 312 U. S. 426, 438; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 231; *J. I. Case Company* v. *National Labor Relations Board*, 321 U. S. 332, 341-342.

[8] *Art Metals Construction Company* v. *National Labor Relations Board*, 110 F. 2d 148, 151 (C. A. 2), and see dissenting opinion at 152-154. See also, 2 Teller, *Labor Disputes and Collective Bargaining*, § 373 (1940).

> that the employees may have full and accurate information of the decisions of the Board. (Italics supplied.)

And in a companion case decided the same day, the Court of Appeals for the Fourth Circuit stated that (*National Labor Relations Board* v. *A. S. Abell Co.*, 97 F. 2d 951, 959 (C. A. 4)):

> The requirement that notice of the decision and order of the court should be published whereby employees may receive precise information of the action of the Board upon a complaint against their employer is within the power of the Board to direct such affirmative action on the part of the employer as will effectuate the policies of the Act.

This Court's elimination of the notice-posting requirement in this case is, therefore, an upset of uniform, settled, and undeviating practice sanctioned by the experience derived from long years in the administration of the National Labor Relations Act. There is nothing in the posture of the present case which so far differentiates it from the run of cases that publication of accurate information by the employer of the nature of its obligation has no rational connection with the effectuation of the statutory policy. On the contrary, where, as here, the conduct of the employer was not "in good faith" and was "manifestly inconsistent with the principle of collective bargaining" (Slip Op., p. 8), and the issue presented by the conduct was

deemed by this Court important "in the administration of the labor relations statutes." (Slip Op., p. 3), the unfair labor practice cannot be regarded as minimal and tangential. To dissipate its effect and to prevent its recurrence, the suasion which arises from informed publicity is plainly appropriate.

When the free exercise by employees of the right to collective bargaining is thwarted by the commission of an unfair labor practice, the inhibition to the exercise of the right which arises among the employees will in some measure be dissipated by the employer's public assurance that the practice will not recur in the future. The posting of notices serves to restore the situation which the employer's infraction has disturbed by the resurgence of confidence in the employees that their rights cannot be infringed with impunity. To the Court it may seem clear that the employer will not again engage in forbidden labor practices. To the employees, with the wrongful conduct uppermost in their minds, it may not be so clear. An announcement from the source of managerial authority is the means best calculated to recreate the freedom which is guaranteed in the Act and which has been impaired by its infringement.

By the same token, the posting of notices prevents the occurrence of unfair labor practices in the future. Employees apprised of the scope of the employer's obligation will be alert to detect and protest its infringement. Conversely, an employer,

aware that its employees are well-informed, will not repeat its earlier encroachment in the face of instant recognition of its wayward character.

It is no hardship or humiliation to the employer to announce publicly its intention that its labor relations will conform to the law. Nor is the degree of culpability of a particular employer relevant to the need for posting a notice, for so long as the unfair labor practice justifies an order requiring the employer to cease and desist from its commission, it equally justifies the dissemination of accurate information among the employees of the nature of the obligation and the assurance to honor it. Otherwise, it becomes to the last degree difficult and untenable to measure the minutia of difference between the circumstances justifying a cease and desist order sometimes with but sometimes without the public information aspect which until now has been its unbroken attribute.

Illustrative of the elusive character of any such distinction is this Court's decision in *National Labor Relations Board* v. *Mackay Radio & Telegraph Company*, 304 U. S. 333. In that case the employees involved went on strike upon the failure of negotiations over a proposed contract. This Court expressly pointed out that there was "no evidence and no finding that the respondent was guilty of any unfair labor practice" before the strike (304 U. S., at 345). Upon the conclusion of the strike the employer took back most of the strikers but

discriminated against a few of them because of their union activity (304 U. S., at 346-347). This discrimination was the only unfair labor practice involved in the case. The Board in its order required the employer to post a notice. Upon these facts this Court ruled, "The affirmative relief ordered by the Board was within its powers and its order was not arbitrary or capricious" (304 U. S., at 348).

What objective standard can be drawn to ascertain with fair predictability in the run of cases between the *Mackay* case and the present one whether the posting of a notice is appropriate? For example, by what criterion is *J. I. Case Company* v. *National Labor Relations Board*, 321 U. S. 332, 341-342, where, as here, the sole problem presented was the delimitation of the collective bargaining obligation, so far differentiated from the present case as to make it appropriate to require the mailing of individual notices in that case but to make inappropriate any form of publicity in the present case? We recognize that the ease of application of a mechanical rule is no sufficient reason in itself for rejecting a flexible rule. However, the propensity for dissipating and preventing an unfair labor practice which accurate information of the scope of an obligation and assurance of conformity to it gives rise to in every case, the tenuity of any line of distinction which can be drawn, and the invitation to barren litigation which such a line

would present overbalance any conceivable advantage which the elimination of publicity might serve in an isolated case. In this case, as in every case, a rational statutory objective is served by requiring the employer "to publish notices that it would 'cease and desist'" from its unlawful activity and thereby "to convey to the employees the knowledge of a guarantee of an unhampered right in the future" to bargain collectively. *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 462.

One final matter deserves mention. At no stage of the proceedings before the Board, the court below, or this Court did the employer object to the requirement that it post notices.[9] In the light of the long-settled practice of requiring notice-posting in all cases, the employer's challenge to the breadth of the order imported no more insofar as the notice was concerned than that its language would naturally be modified to conform to any constriction in the order's terms. But the Board had no reason to anticipate, and the employer did not suggest, that the total elimination of notice-posting was in issue. *May Department Stores Co.*

[9] No such exception was noted to the trial examiner's intermediate report (R. 53-54). None was mentioned in the employer's brief before this Court. (Em. Br., pp. 53-61.) And the employer's brief in the court below implicitly acknowledged the propriety of notice-posting when it urged "that any notice to be posted by Respondent should be confined to a statement that Respondent will not unilaterally grant any general wage increases to the employees in the defined bargaining unit without consulting the Union." (Em. Br., p. 39).

v. *National Labor Relations Board*, 326 U. S. 376, 386, n. 5. In conformity with the familiar rule that an objection not timely made is foreclosed, which has particular appositeness in the relation between administrative agency and reviewing court,[10] Section 10 (e) of the National Labor Relations Act provides that:

> No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect shall be excused because of extraordinary circumstances.

No extraordinary circumstances appearing, and the Board not having "patently traveled outside the orbit of its authority," it is "not within the power of the court . . . to make the deletion it made." *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385, 388-389; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253. No more should be done with respect to the notice than to require that it be adapted to the terms of the decree ultimately entered.

WHEREFORE, it is prayed that a rehearing be granted and that, upon such rehearing, the Court modify its decision to require the posting of notices adapted to the constricted terms of the decree to

[10] See the cases cited in Mr. Justice Reed's dissenting opinion in *United States ex rel. Johnson* v. *Shaughnessy*, No. 506, This Term, decided May 9, 1949.

be entered, and grant such other and further relief as the Court may deem proper.

Respectfully submitted,

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JUNE, 1949.

CERTIFICATE OF COUNSEL

Comes now Philip B. Perlman, Solicitor General, and certifies that he has read and knows the contents of the foregoing petition, and that said petition is filed in good faith and not for purposes of delay.

PHILIP B. PERLMAN,
Solicitor General.

JUNE, 1949.

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